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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-617

ELMER GERTZ,

Petitioner,

vs.

ROBERT WELCH, INC.,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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Respondent's Brief in Opposition to Petitioner's Petition for Certiorari is tantamount to no opposition at all, as Respondent has set forth no sufficient reasons why this Court should not grant the Writ. Were it not for the fact that Respondent has made certain material misstatements, Petitioner would rely solely upon his Petition.

Respondent's first basic misstatement appears in the very first line of its Argument, when it states that Petitioner's contention that he was not spoken of in a "public capacity" was an issue not presented to the Court of

Appeals. This is simply untrue. The Court did not even discuss this issue in its opinion, which is one of the reasons that Petitioner seeks Certiorari. The issue has not been explored adequately in any opinion which Petitioner has been able to discover, and should be resolved by this Court in order to define further the constitutional rights of parties in such circumstances. Petitioner raised and argued this issue most vigorously in his brief before the Court of Appeals. The contentions urged by Petitioner in that forum, which were not discussed there, are further reason for the granting of the Writ herein. We said there, and urge before this Court, the following:

> ". . . the article involved herein does not refer to plaintiff in any public capacity, but only in his capacity as a private attorney. That is made clear in the article, which refers to him as the attorney for the parents of Ronald Nelson. It has been held repeatedly and without exception that in order for a defendant to avail himself of constitutional protection in a libel suit, his statement about the plaintiff must be in relation to his public activities. *Belli* v. *Orlando Daily Newspapers*, 389 F. 2d 579 (5th Cir. 1967), cert. den. 393 U.S. 825; *Stearn* v. *MacLean-Hunter Ltd.*, 76, 78 (S.D.N.Y. 1969)."
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> "The trial court held that the subject matter of the article was a matter of public interest and concern, which was protected by the First and Fourteenth Amendments. He found that plaintiff 'played a small part in the vast sweep of the whole article.' Yet, he found that plaintiff was thereby required to prove actual malice in the constitutional sense in order to recover. The trial court based its decision in part upon the decision of the Supreme Court in *Time, Inc.* v. *Hill*, 384 U.S. 374, 87 S. Ct. 534 (1967), where

it was held that a private individual could not bring an invasion of privacy action against a publisher who was guilty of no more than innnocent or negligent misstatement. However, the Court expressly declined to rule upon the issues presented in this case, stating:

> 'Were this a libel action, the distinction which has been suggested between the relative opportunities of the public official and the private individual to rebut defamatory charges might be germane. And the additional state interest in the protection of the individual against damage to his reputation would be involved. . . . But the question whether the same standard should be applicable both to persons voluntarily and involuntarily thrust into the public limelight is not here before us.' Id. at 391, 87 S. Ct. at 543-44.

"Thus, by merely applying the *Hill* case without an analysis of the underlying policies, the Court was led astray. For, to hold, that the mere fact that a subject matter is deemed newsworthy enough to be printed by the defendant cannot in fact be the sole determining factor. This would allow each defendant to manufacture his own defense, which is directly contrary to the policies which the trial court recognized in holding the article libelous per se. The state does indeed have an interest in protecting the reputation of its citizens, and its attorneys no less. Yet, no recognition was given to this policy. The subject matter must be a legitimate matter of public interest, not something of only slight interest to the public. *Cepeda* v. *Cowles Magazine and Broadcasting, Inc.*, 392 F. 2d 417, 419 (9th Cir. 1968), cert. den. 393 U.S. 840.

"In recognition of this policy the courts have evolved certain distinctive categories of what is of legitimate public interest and concern, such as the public acts and qualifications of officials and candi-

dates, the management of educational, charitable and religious institutions, public offerings of a literary, artistic and scientific nature, and public offerings of products for use and consumption. *Afro-American Publishing Company* v. *Jaffe*, 366 F. 2d 649, 656 (D.C. Cir. 1966).

"The fundamental error of the trial court was in failing to recognize that the policies which led to the application of constitutional protections to matters of public interest is a flexible tool to be used in accordance with the legitimate policies behind the first amendment. However, conceding that an article might of itself deal with a matter of public interest and concern, this does not mean that every person mentioned in that article is governed by the same rules. To so hold would be to fall into that old trap which has been condemned again and again of exalting form over substance. Certainly different persons mentioned in the same article may be in different categories and subject to different rules. Clearly the assistant state's attorneys mentioned in the article are public officials and fall within the ambit of *New York Times*. Perhaps, some of those mentioned in the article made public speeches and pronouncements of the subject matter thereof, thereby thrusting themselves into the vortex as did General Walker. But, this does not mean that the mention of every person in an article dealing generally with a matter of public interest must thereby prove actual malice in the constitutional sense. To so hold would defeat the legitimate policy of protecting one who has not sought attack and who cannot defend himself. Such ruling would allow an unscrupulous publisher to bring in a person not legitimately connected with the subject matter of the article in general and defame him with a great measure of impunity in the guise of serving the greater public good. Such a result was

never intended and would be a perversion of a laudable principle.

"This is what occurred here. The gist of defendant's article was that the police in this country are the subject of an attempt to discredit them by Communists, and that the criminal indictment and conviction of Nuccio was the result of such conspiracy. However, plaintiff had absolutely nothing to do with the criminal proceedings, as attested to by Nuccio's attorney and even by defendant itself. He represented private clients in a circumspect and inconspicuous manner. This was no legitimate part of the article or the subject matter thereof.

"When does a matter become a public issue of such nature as to bar a defamed plaintiff from recovery short of actual malice or gross recklessness? Is it when any extremist of the right or left or a mere zealot or crackpot declares it to be such, whether or not he is fair and reasonable? And how deeply must the plaintiff be involved in the matter in order to prevent recovery on his part, assuming absence of actual malice or gross recklessness? If defendant's theory is adopted, all of us, including reputable lawyers, are at the mercy of those who lightly and without cause defame us.

"In the situations in which recovery has been barred by reason of the presence of public issues, such as *Farnsworth* v. *Tribune Co.*, 43 Ill. 20, 286, the plaintiff himself has been a principal participant, the very one in the center of the stage. If it were Nuccio who claimed he was defamed, it might be said that by reason of his being charged with a crime, he was a public figure involved in a public matter. Plaintiff is in no analogous position. Even Nuccio's own attorney said that plaintiff was not involved in any way and was certainly not a part of any conspiracy.

"When a person or corporation is at the center of an article, controversy or investigation, the result of which is of interest or concern to the public, there are strong policy considerations in favor of requiring and showing of actual malice in the constitutional sense. If it were otherwise, the right of the populace to obtain information would be effectively thwarted. This has been the basis of the cases relied upon by the trial court in granting judgment notwithstanding the verdict. The public indeed has a right to know about persons who have been arrested. *Rosenbloom* v. *Metromedia, Inc.*, 415 F. 2d 892, 894-96 (3d Cir. 1969), *cert. granted*, 397 U.S. 904 (1970); those who consort with reputed gangsters, *Wasserman* v. *Time, Inc.*, 424 F. 2d 920, 922 (D.C. Cir. 1970), *cert. denied*, 398 U.S. 940 (1970), *Time, Inc.* v. *Ragano*, 427 F. 2d 219, 221 (5th Cir. 1970); those who delve into elections in foreign countries, *Time, Inc.* v. *McLaney*, 406 F. 2d 565, 573 (5th Cir. 1969), *cert. denied*, 395 U.S. 922 (1969); those who deal in public health, *United Medical Laboratories* v. *Columbia Broadcasting System*, 404 F. 2d 706, 711-12 (9th Cir. 1968), *cert. denied*, 394 U.S. 921 (1969), *Farnsworth* v. *Tribune Co.*, 43 Ill. 2d 286, 290-92, 253 N.E. 2d 408 (1969); and those who hold themselves out to accommodate the public, *Bon Air Hotel, Inc.* v. *Time, Inc.*, 426 F. 2d 858, 860-62 (5th Cir. 1970).

"The same policies most emphatically do not, however, allow a publisher to drag an innocent third party, who is not at the center of the subject matter of an article, into a controversy for the mere purpose of defaming him as was done here. Plaintiff was not being spoken of regarding the way in which he handled a case or represented a client, but he was spoken of as a Communist, a Marxist and a Leninist, completely divorced from anything else. What legiti-

mate public purpose does such a statement serve? If it is true, then defendant has his complete defense.

"Of great importance is the fact that the trial court did in fact allow the jury to consider defendant's defense of public issue. Defendant's counsel was permitted to argue in his closing statement that there were public issues with respect to Nuccio and the police and that what defendant wrote as to plaintiff should be considered fair comment. If the jury believed this argument, they were free to decide in favor of defendant. This they did not do because there was no support in the evidence for this position. Hence the court should not have granted defendant's post-trial motion."

Secondly, Respondent contends that Petitioner's due process contentions were disposed of by the Court of Appeals. A reading of the opinion of the Court of Appeals, which Respondent quotes, in part, in its Brief in Opposition, makes it clear that the Court did not understand the issue which Petitioner raised there. As is set forth in the Petition for Certiorari, the District Court informed Plaintiff that he was not required to prove actual malice, either in the constitutional, or in any other sense, as the Court regarded the article as libelous *per se*, and so instructed the jury. Then, only after the jury had returned a verdict in favor of plaintiff, the District Court did an about face and stated that plaintiff was required to prove actual malice in the constitutional sense, which, the Court said, he had not done. The Court failed, at this point, having changed its viewpoint, to give plaintiff opportunity to prove malice; and this basic denial of due process was confirmed, in effect, by the Court of Appeals.

The issue which Petitioner urged upon the Court of Appeals, and renews here, is that, as a matter of fair play and due process, he must be given an opportunity to present evidence which would satisfy that burden of proof. To this very date, he has not been given an opportunity to do so. The matters set forth before the Court of Appeals were not for the purpose of convincing the Court of Appeals "to take judicial notice of a reckless disregard for the truth on the part of the John Birch Society and its affiliates", as the Court of Appeals mistakenly held, but was for the purpose of giving that Court an indication of the kind of evidence which was available to Petitioner to be used to prove actual malice should a retrial become necessary. For example, Respondent states in its brief here that Petitioner was part of a conspiracy to frame a police officer although it was admitted at trial that this was untrue. *It must be reiterated that Petitioner has thus far been foreclosed from introducing this kind of evidence, and has not been given an opportunity to prove malice in the constitutional sense, if that is in fact required.*

It is a deprivation of due process to hold, *ex post facto*, as did the Court of Appeals and the District Court, that plaintiff must prove this kind of malice and then deprive him of an opportunity to do so, as was also done.

Finally, both the District Court and the Court of Appeals have ignored the evidence of actual malice which Plaintiff, only fortuitously, did introduce at the trial. This evidence is set forth at pages 21 through 26 of Petitioner's Petition for Writ of Certiorari, and the Court is referred thereto. It should be noted particularly

that defendant distributed the defamatory publication for almost a year after suit was filed.

This Court has not defined extensively what kind of evidence is sufficient to present a *prima facie* case of actual malice. This case presents an admirable vehicle for a clarification of the law. Public policy requires that this Court delve into the special areas presented by this case.

May an extremist publication make it a practice to make irresponsible statements and then avoid consideration of those statements in a determination of actual malice? Should not a publisher be required to vouch for and justify its outlandish and continually distorted attacks? Should not such a tendency be considered by a jury in determining whether such publisher is acting in bad faith and with actual malice?

Such a question and the evidence presented by plaintiff should be explored and considered by this Court. We are not dealing with suppression of opinion in any manner. We are dealing with the right of a private citizen to seek vindication for injury done him wherein all parties are given an opportunity to present the facts to a court of law in a fair setting. Plaintiff has never had that opportunity constitutionally. It should not be denied him.

Private persons such as Petitioner have no other forum in which to defend and vindicate themselves. They have no access to public print, as does a publisher owning its own magazine with full ability to print what it desires at will.

CONCLUSION.

Petitioner asks this Court to issue its Writ of Certiorari to consider important issues which have not been explored. The determination of these issues is likely to have far-reaching consequences as to the extent to which attorneys will feel safe in representing the interests of clients. For the good of society, not only must the press be kept free to discuss important matters, but others, particularly lawyers, must be allowed to remain free to act without being placed in such a position that they may be destroyed without an opportunity to respond in an orderly and constructive manner.

WHEREFORE, Petitioner prays that this Court's Writ of Certiorari issue and that the judgment below be reversed.

Respectfully submitted,

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